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ALERT

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DOL ISSUES FINAL RULE ON PAY - SUBSTANTIALLY RAISING MINIMUM SALARY THRESHOLD TO QUALIFY FOR OVERTIME EXEMPTION

By Jo Bennett

The minimum salary threshold for employees to be considered overtime “exempt” under the Fair Labor Standards Act (“FLSA”) will double beginning December 1 under a final rule announced this week by the U.S. Department of Labor. Under the new rule, which will be published on May 23, 2016:

- The minimum salary threshold for overtime exempt status for “executive,” “administrative,” and “professional” classifications increases from \$455 per week to \$913 per week (\$47,476 per annum);
- The minimum salary threshold will be adjusted automatically every three years; and
- There is no change in the “duties test.”

The Labor Department estimates that an additional 4.2 million workers will be entitled to overtime under the new standard. The December 1 effective date gives employers six (6) months to assess the rule’s impact on the duties, hours and classification status of their workers and to make adjustments.

Under the FLSA, non-exempt workers must be paid 1.5 times their regular hourly rate for all hours worked in excess of 40 in a workweek. The FLSA contains a number of exemptions from the overtime requirements, including the so-called white-collar exemptions. Under these exemptions, employees

who work in managerial, administrative and professional positions do not have to be paid overtime as long as they are paid the minimum salary established by the Labor Department and meet the duties test.

The new rule increases the salary level for the white-collar exemptions for the first time since 2004, when the \$455 a week/\$23,660 a year standard was adopted. Under the new standard, the minimum salary threshold will be equal to the 40th percentile of earnings for full-time salaried workers in the lowest-wage Census region (currently, the South). In the proposed rule, the Labor Department suggests that it will adopt the 40th percentile of earnings nationwide. The change in position means that the minimum salary threshold is about \$3,000 to \$4,000 less than originally contemplated.

The new rule also increases the minimum salary threshold for “highly compensated employees” from \$100,000 to \$134,004 a year, or at the 90th percentile of full-time salaried workers nationally.

The final rule permits employers to include in the threshold calculations as much as 10 percent of non-discretionary bonus, incentive or commission pay, as long as the payments are made on at least a quarterly basis. Business groups lobbied for these types of pay to be part of the threshold calculation.

Under the new rule's automatic adjustment feature, the minimum salary threshold for exempt status will increase every three years, beginning January 1, 2020. The increase will raise the threshold to the 40th percentile of full-time salaried workers in the lowest wage Census region. The Labor Department estimates that the 2020 salary minimum level will be \$51,168. In its proposed rule issued last year, the Labor Department had suggested that it would apply the automatic adjustment on an annual basis.

The Labor Department left the duties test intact. Under the statute, an "executive" employee must have a primary duty of managing the enterprise or a department or subdivision of the enterprise, customarily and regularly direct the work of at least two employees, and have the authority to hire or fire (or have significant influence in hiring and firing).

An "administrative" employee must have a primary duty of the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers. An exempt administrative employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance.

A "professional" employee must: (1) perform work requiring knowledge of an advanced type in a field of science or learning customarily acquired by prolonged, specialized, intellectual instruction and study, (2) perform work that is original and creative in a recognized field of artistic endeavor, or (3) teach in a school system or educational institution, (4) work as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field, *and* perform work requiring the consistent exercise of discretion and judgment.

The minimum salary threshold test does not apply to physicians, lawyers and teachers.

In proposing the rule last year, the Labor Department suggested that it would require employers to come

into compliance within 60 days. The final rule, however, provides employers with a six-month period to analyze their workforce and to determine how best to comply with federal wage-and-hour law.

What Employers Need to Do

Employers need to review their workforce to determine whether any employees currently classified as overtime exempt lose that exemption under the new regulations. If so, in order to meet the new regulation, the employer must: 1) raise the employee's salary above \$913/week, or 2) classify the employee as non exempt for overtime purposes. Option two means recording the employees hours and paying the employee time and a half of their regular rate of pay for all hours worked over 40. ♦

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